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**DEPARTMENT OF THE INTERIOR  
National Park Service**

**36 CFR Parts 1, 3 and 13**

**RIN 1024-AC65**

**Personal Watercraft Use Within the NPS System**

**AGENCY:** National Park Service, (NPS), Interior

**ACTION:** Final Rule

**SUMMARY:** This rule will prohibit personal watercraft (PWC) in areas of the National Park System unless the NPS determines that PWC use is appropriate for a specific area based on that area's enabling legislation, resources and values, other visitor uses and overall management objectives. This rule describes a process that will allow continued PWC use in some areas and will enable us to protect visitors and resources while managing the use of personal watercraft.

**EFFECTIVE DATE:** April 20, 2000

**ADDRESSES:** Mail inquiries to: NPS - Ranger Activities Division, Room 7408, 1849 C Street NW, Washington, D.C. 20240.

**FOR FURTHER INFORMATION CONTACT:** Chip Davis at the above address or by calling 202-208-4874.

**SUPPLEMENTARY INFORMATION:**

**Background**

The NPS is granted broad statutory authority under various acts of Congress to manage and regulate water activities in areas of the National Park System, 16 United States Code, (U.S.C.) and 16 U.S.C. 1a-2(h) and 3. The Organic Act, 16 U.S.C. 1 *et seq.*, authorizes the NPS to "...regulate the use of the Federal areas known as national parks, monuments, and reservations ... by such means and measures as conform to the fundamental purpose of the said parks ... which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." Congress has also emphasized that the "...authorization of activities shall be construed and the protection management and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or

shall be directly and specifically provided by congress.” 16 U. S. C. 1a-1. The appropriateness of a visitor use or recreational activity will vary from park to park. *NPS Management Policies* states that “. . . because of differences in individual park enabling legislation and resources and differences in the missions of the NPS and other Federal agencies, an activity that is entirely appropriate when conducted in one location may be inappropriate if conducted in another” (Chapter 8:2-3).

*NPS Management Policies* provide further direction in implementing the intent of the congressional mandate and other applicable Federal legislation. The policy of the NPS regarding protection and management of natural resources is "The National Park Service will manage the natural resources of the national park system to maintain, rehabilitate, and perpetuate their inherent integrity" (Chapter 4:1).

The Organic Act and the other statutory authorities of the NPS vest us with substantial discretion in determining how best to manage park resources and provide for park visitors. “Courts have noted that the Organic Act is silent as to the specifics of park management and that ‘under such circumstances, the Park Service has broad discretion in determining which avenues best achieve the Organic Act’s mandate.... Further, the Park Service is empowered with the authority to determine what uses of park resources are proper and what proportion of the park resources are available for each use.” *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1454 (9th Cir. 1996), quoting *National Wildlife Federation v. National Park Service*, 669 F. Supp. 384, 390 (D.Wyo. 1987). In reviewing a challenge to NPS regulations at Everglades National Park, the court stated, “The task of weighing the competing uses of Federal property has been delegated by Congress to the Secretary of the Interior.... Consequently, the Secretary has broad discretion in determining how best to protect public land resources.” *Organized Fishermen of Florida v. Hodel*, 775 F.2d 1544, 1550 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). There is a limitation on this discretion.

Over the years, NPS areas have been impacted with new, and what often prove to be controversial, recreational activities. These recreational activities tend to gain a foothold in NPS areas in their infancy, before a full evaluation of the possible impacts and ramifications that expanded use will have on the area can be initiated, completed and considered. PWC use fits this category.

PWC use is a relatively new recreational activity that has been observed in about 32 of the 87 areas of the National Park System that allow motorized boating. PWCs are high performance vessels designed for speed and maneuverability and are often used to perform stunt-like maneuvers. PWC includes vessels commonly referred to as jet ski, waverunner, wavejammer, wetjet, sea-doo, wet bike and surf jet. Over 1.3 million PWCs are in use today with annual sales of approximately 150,000 units. The Personal Watercraft Industry Association (PWIA), which consists of about five or six PWC manufacturers, coined the term “Personal Watercraft.”

This rule takes a conservative approach to managing PWC use in areas of the National Park System based on consideration of the potential resource impacts, conflicts with other visitors’ uses and enjoyment, and safety concerns. The rule prohibits PWC use in areas of the National Park System unless we determine that PWC use is appropriate for a specific area based on that area’s enabling legislation, resources, values, other visitor uses, and overall management objectives.

It is the policy of the National Park Service to regulate motorized recreational activity in park areas to mitigate resource degradation. It is our intention to utilize the expertise of the Environmental Protection Agency, Occupational Safety and Health Administration and other cooperating agencies as a way of maintaining the environmental integrity of park areas.

The rule allows two methods of authorizing PWC use. The first method is available for a relatively small group of Park Service areas (10 park areas identified in Table 1) where authorization might be appropriately and successfully accomplished through the Park Superintendent's Compendium, a locally based procedure described in 36 CFR 1.5 and 1.7. This method is referred to as Park Designated PWC Use. The second method, Special Regulation rulemaking through the *Federal Register*, is available for all park areas (including the 10 park areas in Table 1) where authorization of PWC use may be deemed appropriate. This method is referred to in this rule as Special Regulation PWC Use.

As an interim measure, a two-year grace period is available to NPS areas listed in the regulation. Park areas are identified for inclusion on the two tables established in this rule based upon whether there is current PWC use and an area's enabling legislation, resources, values, other visitor uses, and overall management objectives for the individual park area. The grace period would allow PWC use to continue, with any necessary and appropriate restrictions, while park managers evaluates the impact of PWC use in the identified park area. Superintendents may restrict PWC use through zoning, hour limits, etc., during the grace period. PWC use could also be closed during the grace period in any area through the compendium procedures, by following the public process described in 36 CFR §1.5 and 1.7.

The first method for authorizing PWC use in park areas is through the Park Superintendent's Compendium. The following areas are in this Park Designated PWC Use category:

Table 1. Park Designated PWC Use	Water Type	State
Amistad National Recreation Area	Impounded Lake	TX
Bighorn Canyon National Recreation Area	Impounded Lake	MT
Chickasaw National Recreation Area	Impounded Lake	OK
Curecanti National Recreation Area	Impounded Lake	CO
Gateway National Recreation Area	Open Ocean/Bay	NY
Glen Canyon National Recreation Area	Impounded Lake	AZ/UT
Lake Mead National Recreation Area	Impounded Lake	AZ/NV
Lake Meredith National Recreation Area	Impounded Lake	TX
Lake Roosevelt National Recreation Area	Impounded Lake	WA
Whiskeytown-Shasta-Trinity National Recreation Area	Impounded Lake	CA

In these Park Designated areas, Table 1., PWC use could continue, subject to management

restrictions through the compendium, until April 22, 2002. After this date continued PWC use in these areas will require authorization either by the compendium or by special regulation as described below. During the grace period April 20, 2000 to April 22, 2002 no authorizing administrative action is needed to allow PWCs to continue to operate in the park areas identified in Table 1. The grace period maintains the authority requirements that existed prior to the adoption of this regulation for two years.

The compendium procedures authorize the superintendent to restrict or allow activities, among other things, “for the maintenance of public health and safety, protection of environmental or scenic values, protection of natural or cultural resources, ...or the avoidance of conflict among visitor use activities.” 36 CFR 1.5(a). These procedures authorize the superintendent to take such actions using locally based methods, unless the proposed action “is of a nature, magnitude and duration that will result in a significant alteration in the public use pattern of the park area, adversely affect the park’s natural, aesthetic, scenic or cultural values, require a long-term or significant modification in the resource management objectives of the area, or is of a highly controversial nature...” 36 CFR 1.5 (b). In these circumstances, the superintendent must elevate the authorization to a Special Regulation rulemaking through the *Federal Register*, which is the authorization procedure required by this rule of all other areas of the National Park System designating PWC use.

A review of the legislation establishing these ten Park Designated areas shows that water-related recreation was a primary purpose for these ten parks and they are characterized by substantial motorized use. Nine of the park areas contain man-made lakes created by the construction of dams, and one park area has open ocean or bay waters. It has been our experience that visitors to all ten areas appear generally to expect and accept a variety of motorized boating, including PWCs.

Whether a regulation or a compendium has been adopted to designate the use of PWCs in an area, the superintendent maintains the authority under 36 CFR 1.5 to manage the PWC use within these areas, e.g., by area closures, public use limits or other restrictions.

The second method for authorizing PWC use in park areas is a Special Regulation rulemaking in the *Federal Register*. The following areas covered by the two-year grace period are in this Special Regulation category:

Table 2. Special Regulation PWC Use	Water Type	State
Assateague Island National Seashore	Open Ocean/Bay	MD/VA
Cape Cod National Seashore	Open Ocean/Bay	MA
Cape Lookout National Seashore	Open Ocean/Bay	NC
Cumberland Island National Seashore	Open Ocean/Bay	GA
Fire Island National Seashore	Open Ocean/Bay	NY
Gulf Islands National Seashore	Open Ocean/Bay	FL/MS
Padre Island National Seashore	Open Ocean/Bay	TX
Indiana Dunes National Lakeshore	Natural Lake	IN
Pictured Rocks National Lakeshore	Natural Lake	MI
Delaware Water Gap National Recreation Area	River	PA/NJ
Big Thicket National Preserve	River	TX

In these Special Regulation areas, Table 2., PWC use could continue during the grace period, subject to appropriate limited restrictions through the compendium, until April 22, 2002. During this two-year grace period, the superintendents of these areas would be able to develop special regulations to allow PWC use to continue. After April 22, 2002, PWC use in these areas can be authorized only by special regulation as described below.

The Special Regulation method provides publication in the *Federal Register* with nationwide notice and opportunity to comment on any proposal to authorize PWC use in an area of the NPS. This method is similar to the approach we have used on other activities that raise questions of resource impacts, visitor use conflicts, or significant controversy, such as snowmobile and off-road vehicle use, bicycle use in undeveloped park zones, aircraft landing, and hang-gliding. (See, e.g., 36 CFR 2.17, 2.18, and 4.30).

CLASSIFICATION	TWO YEAR GRACE PERIOD		AFTER TWO YEARS	
	Open	Closed	Open	Closed
Park Designated Areas (36 CFR 1.5 & 1.7) (10 Areas)	Yes Manage PWC by Compendium	No Can close by Compendium	No Except by Compendium or Special Regulation	Yes If no Compendium or Special Regulation in place
Special Regulation Areas (11 Areas)	Yes Manage PWC by Compendium	No Can close by Compendium	No Except by Special Regulation	Yes If no Special Regulation in place
All Other Areas	No Except by Special Regulation	Yes Closed by General PWC Regulation	No Except by Special Regulation	Yes If no Special Regulation in place

Our conservative approach to authorizing PWC use in areas of the NPS reflects many concerns that have been raised about such use. These concerns, detailed in the preamble for the proposed rule, coupled with an analysis of the comments received, lead us to conclude that PWC use is inappropriate in most areas of the National Park System. We also recognize that PWC use appears to be appropriate in certain park areas. It is clear that Congress intended the NPS to manage an active motorized water-based recreation program on the large man-made lakes of Lake Mead and Glen Canyon National Recreation Areas and it seems appropriate for PWC use to be part of that recreation program. The final rule designates park areas where PWC use would be allowed. Any designation must take into consideration the park area's enabling legislation, resources and values and other visitor uses.

Twelve NPS areas are closed as a result of the current rulemaking, (listed below, Group A). Two additional areas have existing closures by prior park specific regulations, Everglades & Yellowstone National Parks and two additional areas have horsepower and/or engine restrictions which prohibit PWC use, Buffalo & Ozark National Rivers (listed below Group B). Crescent Lake in Olympic National Park and lakes in Glacier and North Cascades National Parks closed based on public comment and hearings during the park General Management Plan process. Additional lakes in Olympic NP may close during this rulemaking.

Group A: NPS Areas of Prior PWC Use That Closed During This Rulemaking	Water Type	State
Biscayne National Park	Open Ocean/Bay	FL
Canaveral National Seashore	Open Ocean/Bay	FL
Golden Gate National Rec Area	Open Ocean/Bay	CA
Cape Hatteras National Seashore	Open Ocean/Bay	NC
Apostle Islands National Lakeshore	Natural Lake	WI
Isle Royal National Park	Natural Lake	MI
Glacier National Park	Natural Lake	MT
Olympic National Park	Natural Lake	WA
Sleeping Bear Dunes National Lakeshore	Natural Lake	MI
Canyonlands National Park	River	UT
Grand Canyon National Park	River	AZ
St. Croix National Scenic Riverway	River	WI/MN

Group B: NPS Areas Closed to PWC Use By Other Prior Means	Water Type	State
Everglades National Park	Open Ocean/Bay	FL
Buffalo National Scenic River	River	AK
Ozark National Scenic Riverways	River	MO
Glacier National Park	Natural Lake	MT
Olympic National Park	Natural Lake	WA
Yellowstone National Park	Natural Lake	MT/WY
North Cascades National Park	Impounded Lake	WA

The National Recreation Lakes Study Commission (NRLS) lists 1,782 federally managed man-made lakes and reservoirs. The NPS manages 82 of these lakes, ( 4.6%). A number of the NPS managed lakes will have continued PWC use. Therefore, well over 95% of the federally managed recreation lakes will be unaffected by this rulemaking. The NRLS report is available on the Department of Interior's web site [www.doi.gov/nrls/freq\\_ask.htm](http://www.doi.gov/nrls/freq_ask.htm)

## **Changes to the Final Rule**

Some changes have been made to the lists of park areas that were in the proposed rule.

The two-year grace period described in the proposed rule remains available to a limited number of listed park areas. The grace period allows PWC use to continue, with any necessary restrictions, while park management evaluates the future of PWC use in the identified park area. Golden Gate and Chattahoochee National Recreation Areas and Canaveral and Cape Hatteras National Seashores were removed from the list. The Superintendents in these park areas determined since the proposed rule was published that PWC use posed a significant threat to park resources and values and adversely affected the park experience of other visitors. Sleeping Bear Dunes National Lakeshore was removed from the lists because the Superintendent determined that PWC use interferes with park visitor's opportunity to experience solitude and quiet in a near primitive environment. The Superintendents closed park waters to PWC use after determining that PWC use is not compatible with the purpose of the parks or the goals/objectives for management of the parks. Therefore, these park areas no longer need the coverage of the grace period.

Gulf Islands and Padre Island National Seashores were moved from the list of areas in the proposed rule using the Superintendent's compendium to authorize PWC use (Table 1) to the list of areas required to use Special Regulation rulemaking in the Federal Register (Table 2) in order to authorize the use of PWCs after the two year grace period. These two park areas were moved to the Special Regulation list (Table 2) because the park areas listed in the Park Designated PWC Use category (Table 1) are National Recreation Areas consisting of impounded lakes with active boating programs (Gateway National Recreation Area is also included in Table 1). It was determined that the two National Seashores should be on the list (Table 2) with the other National Seashores and subject to the same procedural requirements of promulgating a Special Regulation if PWC use is to continue after the two year grace period.

Big Thicket National Preserve was added to the list of areas covered by the grace period in order to allow use of PWC to continue during the Special Regulation rulemaking period (Table 2). Big Thicket National Preserve should have been included in the list (Table 2) in the proposed rule and was not included only because of an administrative oversight by the NPS. Big Thicket National Preserve satisfies the same criteria as the other park areas listed in Table 2. There is current PWC use at Big Thicket Preserve as a recreational activity consistent with the enabling act for the park. The use of PWCs presently is consistent with the resources and values of the park, is not causing any conflicts with other park visitors and is consistent with the overall management objectives of the park. The two-year grace period will enable these three park areas to evaluate the impacts of continuation of use and the appropriateness of future use as part of the rulemaking process.

As a result of comments received, specifically from the State of Alaska, the proposed rule was changed to reflect the statutory (16 USC 3170) and regulatory (43 CRF 36.11) authority that exists authorizing this use in Alaska park areas. The proposed rule has also been changed for purposes of clarification by including in 36 C.F.R. 13, a definition of motorboat.



## **Summary of Comments**

This rule was published in proposed form for public comment on September 15, 1998 (63 FR 49312), with the comment period lasting until November 16, 1998. The National Park Service received almost 20,000 timely written responses regarding the proposed regulation. Of the responses 13,089 were form letters, 724 were individual letters, 778 were electronic mail, and 7,391 were signatures on 87 separate petitions. Responses received included 14,688 from individuals, 1,639 from businesses, 5,650 from organizations, 2 from Federal agencies, and 3 from State governments.

Within the analysis, the term “commenter” refers to an individual, business, or organization that responded. The term “comments” refers to statements made by a commenter.

## **Analysis of Comments**

### **Issue 1.**

We received 12,783 comments from groups, organizations, and individuals alleging discrimination in the prohibition of personal watercraft use in National Park Service areas. Almost all of the commenters stated that we could not prohibit one type of vessel in an area, such as PWC, and allow all other vessels. They said that we could not discriminate. The majority of these comments were from petitions stating that we based the proposed rule on anecdotal evidence and not scientific fact. They said that there was no basis to prohibit personal watercraft use in National Parks.

### **NPS Response**

The District of Columbia Court of Appeals in *Personal Watercraft Industry Association v. Department of Commerce*, 48 F.3d 540 (D. C. Cir. 1995), ruled that an agency could discriminate and manage one type of vessel (PWC) differently than other vessels, provided the agency explains its reasons for doing so. The NPS regulation is intended to give the agency an opportunity to evaluate the impacts of PWC use before authorizing their use. This is the same general approach that the NPS uses for snowmobiles, off-road vehicles and other similar activities. PWC have been singled out because of the concerns raised by park visitors and park managers. These concerns include visitor conflicts, safety, inappropriate use, resource impacts, noise, wildlife disturbance and pollution.

### **Issue 2.**

Numerous commenters suggested that we were abdicating our responsibility to manage personal watercraft use by simply prohibiting their use entirely. They stated that enforcement of existing rules and regulations would remedy or mitigate problems and thus would not discriminate against the vast majority of law abiding PWC users.

## NPS Response

We recognize that enforcement of existing rules and regulations are important; however, enforcement cannot completely prevent user conflicts or resource damage. The NPS believes that giving Superintendents the opportunity to evaluate the impact of personal watercraft use to determine if the use is detrimental to a park's natural, cultural, scenic, aesthetic or recreational values is the best approach for regulating PWC use at this time.

## Issue 3.

We received several industry comments stating that the outspoken views of certain park managers who object to personal watercraft use is indicative of the widespread Service exclusionary attitude toward personal watercraft.

## NPS Response

We do not agree with this statement. There are park areas that will allow uninterrupted PWC use to continue and several others that may allow use after adopting a special regulation through public notice and comment rulemaking process.

## Issue 4.

Numerous commenters stated that our reliance on the Everglades National Park (ENP) report is flawed because it is not a scientific study, more recent research is available, and that the opinions stated in the ENP report are unsupported.

## NPS Response

The ENP report stated that the Endangered Species Act specifically allows for prohibition of activities that may have adverse impacts on listed or proposed species, until studies determine otherwise. We recognize the need for more research but do not subscribe to the idea that there must be harm to the resources before we take action. Further, this rule is not based on the findings of the Everglades National Park Report. The report is merely an additional piece of information supporting this rule.

## Issue 5.

Several commenters suggested that the erosion of solitude was due to a steady increase in park visitation, not one specific type of recreational vessel.

## NPS Response

The average visitation has increased in park areas and the NPS is working hard to maintain the purposes and values of the parks including solitude. Personal watercraft use is one of the

activities that can have a direct and adverse effect on park values such as peace and quiet. As stated in the NPS Management Policies, the appropriateness of a visitor use or recreational activity will vary from park to park. This is particularly true with uses like PWCs.

#### Issue 6.

Numerous commenters stated that we are suggesting that one type of park experience is more meaningful than another. They consider this subjective or discriminatory toward the four million personal watercraft users.

#### NPS Response

The implication is that we place less value on personal watercraft use than other forms of recreation. The Organic Act is the gauge by which the NPS evaluates recreational activities. Those activities that are contrary to the Act must be prohibited. The damage to natural and cultural resources and derogation of other values for which the park was created must be minimized or eliminated in order to avoid activities that permanently impair essential park resources.

#### Issue 7.

Several commenters suggested that the proposed rule be withdrawn and that any regulation of personal watercraft become a part of the current National Park Service comprehensive planning for park use.

#### NPS Response

This rule provides for determinations based on the management objectives of specific park areas. These objectives are part of the comprehensive park planning process. The Organic Act establishes our primary mission as the preservation of parks' natural and cultural resources, while providing for the enjoyment of the visitor. The appropriateness of a visitor use or recreational activity may vary from park to park. *NPS Management Policies* states that "... because of differences in individual park enabling legislation and resources and differences in the missions of the NPS and other Federal agencies, an activity that is entirely appropriate when conducted in one location may be inappropriate if conducted in another" (Chapter 8:2-3).

#### Issue 8.

One organization commented on the social aspect of PWC, stating that the proposed rule could be unfair to the over 1,000,000 PWC owners and the over 3,000,000 family and friends who enjoy PWC use with those owners.

#### NPS Response

The NPS manages a very small portion of the total U. S. water recreation area available to U. S. citizens. There are numerous water recreation areas available for PWC use other than NPS areas.

We will still provide recreation opportunity for PWC use in a number of NPS areas where it is appropriate. Closure of some NPS areas to PWC use will enhance the visitor experience for numerous visitors. NPS management policies derive from the Organic Act and Congressional mandates. Protection of sensitive resources is a primary objective of NPS management. Our conservative approach to PWC use in NPS areas allows us to meet this objective.

#### Issue 9.

We received 271 comments indicating that we could not manage PWC use in NPS areas and banning their use was a simple solution to the problem.

#### NPS Response

PWC have been managed by various methods. This regulation is another method for managing PWC use. As stated in this preamble, the NPS is taking this conservative approach because it believes it is the best method for managing PWC use at this time.

#### Issue 10.

The State of Alaska commented that the proposed regulation was silent on how the special access and procedural provisions of the Alaska National Interest Lands Conservation Act (ANILCA) will be met when regulating PWC use in Alaska's national park system units. The comment noted that Section 1110(a) of ANILCA recognized that motorized equipment used for recreation in the lower 48 states was, in Alaska, often used for access for traditional activities. The comment also stated that PWC use may be incompatible with the other uses and natural values of many park units nationwide and in Alaska. The comment noted that the State is particularly concerned about conflicts with other boaters and other park users and impacts on wildlife, birds and aquatic vegetation.

#### NPS Response

NPS shares the State's concern about the incompatibility of PWC's within park units in Alaska and elsewhere in the United States; such concerns have prompted this regulatory action. The proposed regulations as well as the final regulations here apply to all units of the National Park System, including those in Alaska. The proposed rule clearly indicated that it applied to the Alaska park units in subsection 3.24(a) which stated that PWCs were "allowed only in designated areas" within the National Park System nationwide. Furthermore, no Alaska parks were identified for separate regulatory treatment under either subsections 3.24(b) or (c) of the proposal.

For the reasons explained below, NPS believes that nothing in this regulation is inconsistent with

either Section 1110(a) of ANILCA, which allows access within Alaska conservation system units (including national park system units) by certain specified means, including motorboats, for traditional activities and travel to and from villages and homesites, or the Departmental regulations implementing that statute found at 43 CFR Part 36. In response to the State's comment, we have clarified our interpretation in the NPS regulations at 36 CFR 13.1 by including a definition of the term "motorboat" which clarifies that it does not include a PWC.

The regulations use the term "vessel", which could give rise to an argument that PWCs are "vessels" protected by 43 CFR Part 36. However, the term used in Section 1110(a) of ANILCA is not the broad term "vessel" but the more specific term "motorboat." After examining the legislative history of Section 1110(a), and the Department's analysis in promulgating 43 CFR Part 36 in 1986, as explained in what follows, we concluded that PWCs are not "motorboats" for purposes of Section 1110(a).

There is no existing statutory definition in ANILCA for either "motorboat" or "PWC." It is NPS' understanding that PWCs were rarely, if ever, found in Alaska when ANILCA was enacted. Nothing in the legislative history suggests that Congress intended to authorize the use of PWCs in conservation system units for the purpose of conducting traditional activities in accordance with Section 1110(a). In light of the significant resource impacts posed by PWCs, which were discussed at length in the preamble to the proposed regulation and alluded to in the State of Alaska's comment, and the generally lesser resource impacts of motorboats, we believe that Congress has left to the discretion of the Secretary the authority to define the term "motorboat," and the Secretary has reasonably concluded that this term does not include PWCs.

This conclusion is buttressed by the analysis made by the Department in 1986 when it promulgated two sets of regulations: Regulations applicable to FWS, NPS and BLM which implement Section 1110(a), at 43 CFR Part 36; and the special regulations applicable to motorboat and other motorized watercraft usage on the Kenai National Wildlife Refuge at 50 CFR 36.39(i). The Department-wide regulations were approved by the Undersecretary of the Interior on July 2, 1986, although they were not published in the Federal Register until September 4, 1986 (51 F.R. 31619), and became effective on October 6, 1986. The Federal Register notice for the general regulation identified the Assistant Secretary for Fish and Wildlife and Parks (formerly Deputy Undersecretary for Alaska) as one of its primary authors. The Assistant Secretary also approved the Kenai NWR specific regulations on August 26, 1986. The Kenai regulations were published in the Federal Register on September 11, 1986 (51 F.R. 32329).

The Department has historically made interpretations of the terms and provisions in Section 1110(a). For example, in the general regulations, the Department concluded that helicopters were excluded from the Section 1110(a) protections afforded to airplanes:

.... A few objected to any restrictions being placed upon helicopter use, arguing that helicopters are a widely used means of transportation in Alaska, and that there

is no reason to distinguish helicopters from fixed-wing aircraft. Others suggested that the provisions be amended to specifically allow emergency use of helicopters in areas without a permit, and also to allow helicopter use if pursuant to a memorandum of understanding with the appropriate Federal agency. Interior does not read the statutory authorization “airplane” of section 1110(a) as including helicopters. Accordingly, it is within its discretion to restrict helicopter use. Interior’s experience has shown that uncontrolled helicopter use may have negative impacts on the purposes and values for which the various areas were established, especially upon the wildlife....

51 F.R. at 31627. Using the same kind of reasoning, we have excluded PWCs from the definition of “motorboat.”

In the Kenai regulations, the Assistant Secretary approved a comprehensive regulatory scheme for access under Section 1110(a). Significantly, these regulations distinguished between motorboats and other forms of motorized watercraft:

*Off-Road Vehicles.* (i) The use of air cushion, airboat, or other motorized watercraft, except motorboats, is not allowed on the Kenai NWR, except as authorized by a special use permit from the Refuge Manager.

50 CFR 36.39(i)(3)(i). This was explained in the preamble to the regulation:

With respect to airboats, section 1110(a) of ANILCA and its legislative history indicate that motorboats were the only methods of motorized water transport that were to be given special access to conservation units. The Service recognizes that the modifier “traditional” in section 1110(a) does not refer to transportation methods but to the activities for which access is given. The Service therefore has revised section 3(i) of the regulations by rewording the phrase “non-traditional motorized watercraft” to read “motorized watercraft except motorboats.”

Thus, in approving the Kenai NWR regulations in 1986, the Assistant Secretary specifically recognized that not all motorized watercraft are motorboats for purposes of Section 1110(a).

The Department’s conclusion here is further supported by its treatment of snowmachines, another transportation form recognized in Section 1110(a). In separate regulations promulgated in 1981 implementing, in part, Section 1110(a) only months after the passage of ANILCA, NPS and FWS separately exercised the interpretive discretion afforded to the Secretary and by definition limited the class of snowmachines falling under the provisions of Section 1110(a) to those having a curb weight of less than 1,000 pounds. See, 46 F.R. 31854 (June 17, 1981) and 46 F.R. 31827 (June 17, 1981), respectively. While the Department-wide, general regulation in 1986 replaced various provisions of these NPS and FWS regulations, the general regulation did not define the term snowmachines and left

unchanged both the FWS and NPS definitions. See, 51 F.R. 31619 (September 4, 1986). We have utilized this same interpretive discretion to exclude PWCs from the definition of motorboats herein placed in 36 CFR § 13.1.

As noted in the preamble to the proposed regulations, there has also been a long regulatory history by various Federal agencies, including NPS, FWS and NOAA, in treating PWCs differently from other classes of motorized watercraft. The preamble also noted that at least 34 states have implemented or are considering legislation or regulations specific to the use and operation of PWCs. See 63 F.R. at 49314.

We also note the provision of the 1986 general regulation which explicitly preserves the ability of the appropriate agency to restrict or limit uses of an area under other applicable statutory authority (see, 43 CFR § 36.11(h)(6)) and for which the following explanation was provided:

It is Interior's view however, that these uses may be limited or restricted pursuant to other applicable law. The Secretary of the Interior has authority in the areas administered by Interior to close areas or restrict use for a variety of reasons, such as for health and safety. We do not believe that these provisions of this section of ANILCA were intended to preclude the Secretary from utilizing other statutory authorizations to restrict these uses.... Interior has determined that these regulations should be limited to closures under the authority of that section [1110(a)]. Accordingly, by, limiting these regulations to closures authorized by section 1110(a), it was determined that the category of closure "emergency" was no longer necessary, and as such is covered by other established authority. Regulations providing for the closure of areas for reasons other than under the provisions of section 1110(a) include: For the NPS, 36 CFR 1.5; for the FWS, 50 CFR 25.21; and for the BLM, 43 CFR 8364.

51 F.R. at 31628.

Given the lack of any legislative history suggesting that access by PWC was intended to be protected by Section 1110(a), the Department's analysis in 1986 that underlay the Departmental and Kenai NWR regulations implementing Section 1110(a), and the different resource impacts posed by PWCs compared to motorboats, it is within the Secretary's discretion to define the term "motorboat" to exclude PWCs, and a clarifying definition was included in the final rule to that effect. Because there is little, if any, present use of PWCs in the National Parks in Alaska, we find that excluding PWCs from the definition of motorboat will have little effect on continued access to the parks for the conduct of traditional activities as intended by Section 1110(a).

#### Issue 11.

The International Association of Fish and Wildlife Agencies commented that the NPS could only regulate PWC use in waters where we have jurisdiction. They contend that this authority to regulate could not extend to adjacent waters or navigable waters within Park boundaries that are subject to regulations by States.

#### NPS Response

Congress has directed and the courts have upheld the authority of the NPS to regulate waters within the congressionally established boundaries of a park area. *United States v. Armstrong*, 186 F.3d 1055 (8<sup>th</sup> Cir. 1999). Pursuant to the Property and Commerce Clauses of the U. S. Constitution, Congress has given the NPS specific statutory authority to regulate boating and other activities on waters, including navigable waters, within units of the National Park System, 16 U. S. C. 1a-2 (h).

#### Issue 12.

One PWC manufacturer submitted a comment about the usefulness of PWC in situations other than recreation. For example, they suggest PWC might be useful during flood relief efforts, surf rescue or crowd control during boating events. Additionally the manufacturer suggests that PWC are more functional for disabled users. They contend that the advantage of PWC use by visitors who are paraplegic or otherwise wheelchair bound is that a PWC offers hand controls.

#### NPS Response

Administrative activities in emergency operations involving threats to life, property or park resources, conducted by the NPS or authorized agents will not be affected by this rule. Visitors with disabilities engage in many park experiences including a variety of water activities such as motorized boating where appropriate. PWC use by visitors with disabilities will be allowed in areas where PWC use is determined to be appropriate.

#### Issue 13.

We received four comments in support of PWC as a traditional use and 67 comments opposing PWC, as a traditional use. The remainder of the pro-PWC comments focused on the subjectivity of the term “traditional”. They argue that a PWC regulation based on traditional use as defined by the NPS is one-sided and that the NPS has no right to define what is or is not traditional use. The remaining comments came from a petition saying that PWC use conflicts with many other long-standing traditional uses of parks such as preserves for natural peace and quiet or as wildlife preserves.



## NPS Response

We believe that National Park System areas are preserved specifically because they are outstanding examples of unique natural or historical resources. Thus, by their very nature, the resources of parks are limited and cannot serve all potential uses. Indeed, we are "...empowered to determine what uses of park resources are proper and what proportion of the resources are available for each use." *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1454 (9<sup>th</sup> Cir. 1996), quoting *National Wildlife Federation v. National Park Service*, 669 F. Supp. 384, 390 (D.Wyo. 1987).

## Issue 14.

We received 253 comments indicating that this regulation as proposed would negatively impact the personal watercraft industry. The majority of these were from small business owners or employees. They claimed they make a significant contribution to the economy of their local community and that their business had been hurt. They stated that media leaks from the NPS staff generated negative headlines that have kept customers away. Individual commenters express concern about the negative impact on the PWC industry.

In one response, the Personal Watercraft Industry Association (PWIA) challenges the average annual unit sales data in the proposed NPS rule stating, " the seven year average for the highest seven sales volume years is 147,140, over 25% below the number the NPS quotes." In addition, PWIA questions our assertion that there will be little, if any, economic impact on PWC users or the PWC industry on a regional or national basis. They state, " the number of local and state jurisdictions who have called (cited) the pending NPS PWC rules as justification for restriction or prohibition of PWC use is substantial. In PWIA's opinion, combining the spill over impact in local communities with the negative media interpretation has substantial potential for impact of sales." The PWIA believes that we have not conducted a valid market analysis to conclude that the regulation will result in little economic impact.

## NPS Response

We expect PWC use to continue in several areas of the National Park System. None of the comments related to economic impacts cited specific examples or instances where effects of the regulation would occur. It is likely that any restrictions in one area would likely shift usage to other areas open to PWC use. Since it is likely that the areas of the National Park System which receive the majority of PWC use will remain open, we expect little, if any, economic effect.

The annual sales data we referenced in the proposed rule was extracted from a 1996 PWIA market report, which also indicates that despite declining sales in 1996, PWC sales are expected

to continue to grow at a significant rate.

A study entitled *Economic Activity Associated with Personal Watercraft Use in Monroe County Florida* indicates that local economies will continue to benefit financially from PWC use even if adjacent NPS areas are closed to PWC use.

#### Issue 15.

People who supported PWC use submitted about 100 comments expressing the opinion that they had a “right” to use PWC in NPS areas. The majority of those commenters said that since they pay taxes, they have a right to use public lands and waters. Thirty-six commenters cited the Aquatic Resources Trust Fund (Wallop-Breaux) as a reason that PWC could not be prohibited. They felt this law would not allow the NPS to deny access to taxpayer funded boating facilities. A few commenters stated that it was their constitutional “right” to travel unrestricted on PWC.

#### NPS Response

The payment of taxes does not give a taxpayer the right to unrestricted use of public lands and waters. The Washington State Supreme Court determined that the payment of boat registration fees does not grant the right to use public waters, *Weden v. San Juan County*, 135 Wash.2d 678 (1998). Congress requires the NPS to regulate use of public lands and waters within the NPS system, in order to provide proper protection, management and administration of these areas.

The U. S. Fish and Wildlife Service administers the Wallop-Breaux program providing assistance to States for management of recreational fishing and boating programs. This program does not fund boating facilities in Federal areas such as National Parks. The Wallop-Breaux program only applies to facilities that have accepted federal grant funding. There is nothing in this law that would prevent the NPS from regulation of activities in NPS areas.

#### Issue 16.

We received 161 responses referring to the enabling legislation of certain recreation areas and stated that PWC should be allowed under these sections of the United States Code.

#### NPS Response

We agree that PWC use may be appropriate in some areas of the NPS system. *NPS Management Policies* states that “...because of differences in individual park enabling legislation and resources and differences in the missions of the NPS and other Federal agencies, an activity that is entirely appropriate when conducted in one location may be inappropriate if conducted in another.”

## Issue 17.

We received numerous comments citing the Organic Act and the mission of the Park Service to “protect park resources...for future generations.” Most respondents stated that PWC use was in direct conflict with preservation of the parks. We received 8,122 comments indicating the negative impacts of PWC use on wildlife or wildlife habitat. PWIA objects to our statement in the proposed rule that says “studies also show the disturbance of fish and wildlife associated with PWCs.” They state that “If this statement is meant to provide justification for elimination of an activity, then one could reasonably infer that all access to parks should be banned since all human contact disturbs fish and wildlife.” Further, PWIA objects to the our statement in the proposed rule that states “PWC have a shallow draft, which gives them the ability to penetrate areas that are not available to conventional motorized watercraft.” They state that “a PWC can certainly operate in shallower water than a keel sailboat or an offshore sport fishing vessel. It will operate in the same depth of water as any other waterjet powered runabout.” In addition, all PWC manufacturers recommend operation of PWC in a minimum of two feet of water. PWIA also implies that in the proposed rule we failed to consider a study, which demonstrates no impact to shallow water benthic communities from PWC use in water depths of two feet or more. Finally, the PWIA objects to our statement that PWC access (attributable to shallow draft) has the potential to adversely impact wildlife and aquatic vegetation in these shallow areas. They state “any boating activity can have the same level of impact on wildlife and the study data indicates that a human walking has an impact at an even greater distance than a boat or PWC.”

## NPS Response

We and the U.S. Fish and Wildlife Service have used existing and potential impacts to wildlife as a primary justification for banning and/or restricting PWC use. Since PWC use is erratic and incidental, it is difficult to design studies that capture direct impacts to wildlife. However, there is increasing scientific evidence and anecdotal information that impacts to wildlife from PWC use may be more significant than those caused by conventional boats.

Other waterjet-propelled craft may have the same ability to penetrate areas as PWC, but PWC can penetrate areas not accessible to conventional motorized watercraft. This access has the potential to, and has, adversely impacted wildlife. Studies by both James A. Rodgers, Jr. in Florida and Skip Snow in Everglades National Park support this contention. The fact that manufacturers recommend operation of PWC in a minimum of two feet of water to protect resources is admirable; however, it is evident that not all PWC operators feel compelled to comply with such recommendations. Further, no specific water depth has been established as a “safe” depth for resource protection.

#### Issue 18.

The PWIA states that any boating activity may have an impact on wildlife. The statement, which references the Rodgers study indicating that a walking human has an impact at an even greater distance than a boat or PWC, is misleading. Consideration must be given to the totality of scientific information available within any study before such conclusions are drawn.

Petitioners through the Blue Water Network agree with university studies that indicate that PWC harass and damage wildlife such as shore birds, fish, and seals. Most individual comments concluded that “These noisy machines harass, injure, and kill wildlife.” In one response, the Blue Water Network states, “wildlife biologists throughout North America and elsewhere have testified on the existing and potential impacts of personal watercraft on birds, marine mammals and fish. PWC pose a unique threat to wildlife and wilderness areas because they are multiple impact machines.” Blue Water also asserts that PWC are a physical threat to wildlife because they typically travel at high speeds, in shallow water near sensitive habitats. PWC regularly change direction and speed without warning and emit high-pitched, whining sounds. Blue Water also asserts that PWC lack low frequency, long-distance, sub-surface sounds, which might allow wildlife enough time to avoid collisions.

#### NPS Response

Evaluations conducted by park managers will include close examination of sensitive areas and study wildlife impacts. Mitigation in the form of zoning, seasons, number or speed limits will be available as management options, in addition to area closures.

#### Issue 19.

We received 7,930 comments from individuals and organizations regarding pollution. The vast majority of the comments stated reasons why PWC use should not be allowed in NPS while a few comments challenged the validity of those reasons. Numerous commenters cited exhaust smoke and smell as a concern. Numerous comments also stated that the exhaust on a PWC contains up to 25% of unburned fuel, which pollutes the water.

#### NPS Response

We are concerned about pollution in any form, and exhaust gasses from two cycle marine engines is no exception. We recognize that a certain amount of exhaust smoke and smell is inherent with any two-cycle engine and that the comments addressed excessive amounts from PWC. We acknowledge the findings of the Environmental Protection Agency’s (EPA) 1991 study that indicate two stroke engines lose roughly 25% of the fuel they consume unburned into the water, resulting in high levels of hydrocarbon emissions from these engines. The excessive smoke and smell from PWC could be attributed to unique operational characteristics of those vessels. PWC

are often operated with throttle settings that transition from idle to full throttle and back to idle, typically in a rapid and repeated sequence. Additionally, we are aware of an industry-generated statistic, which states that 25% of all owners have made mechanical changes or modifications to their PWC, which may affect emissions.

#### Issue 20.

Numerous comments expressed concern about the amount of raw fuel spilled into the water or on the shoreline when PWC were refueled by owners/operators at sites other than marina fuel docks.

Comments were received from a few of organizations that addressed pollution of park waters that are used as a source of drinking water. Methyl Tertiary Butyl Ether (MTBE), a gasoline additive and suspected human carcinogen, introduced into the water may be costly and difficult to remove. Commenters continued by saying that the consequences of PWC use on park waters should not be borne by downstream water suppliers or their customers.

#### NPS Response

There is an increasing trend toward off-marina refueling of PWC and fuel spill clean-up materials usually available at marina locations are not available outside of those locations. We are concerned not only with resources within park boundaries, but also with resources and issues adjacent to parks.

#### Issue 21.

One organization specifically referenced Executive Order (EO) 12898, which states that the EPA must protect minority or low income communities from pollution. They also identified park areas that currently affect some of those types of communities.

#### NPS Response

We will continue to comply with all Executive Orders. It is the policy of the National Park Service to regulate motorized recreational activity in park areas to mitigate resource degradation. It is our intention to utilize the expertise of the Environmental Protection Agency, Occupational Safety and Health Administration and other cooperating agencies as a way of maintaining the environmental integrity of park areas.

#### Issue 22.

We received 5,732 comments that cited user conflicts. Of that total, 222 of these comments were from individuals and 5,510 were from a petition from one organization. Specific incidents

cited included conflicts between PWC and kayakers, fishermen, and swimmers. A few PWC supporters said these conflicts resulted from a minority of inconsiderate PWC operators and that we should regulate inappropriate behavior or enforce existing regulations rather than prohibit PWC use. Numerous comments referenced rude, impolite or aggressive behavior by a majority of PWC operators. Numerous comments said that a minority of PWC operators interfere with the enjoyment of the parks by a majority of visitors.

#### NPS Response

It is apparent from the comments received that PWC use negatively impacts across a broad spectrum of park users. NPS recognizes these conflicts between park users and will try different management practices in an effort to minimize these impacts.

#### Issue 23.

A number of comments were received regarding specific parks. These comments were general in nature, stating that PWC should be prohibited in specific parks. For example, Cabrillo National Monument received a number of comments stating that PWC use is "not even an issue" and asking why they are being banned.

#### NPS Response

Cabrillo has been identified as an area where the enabling legislation, resource education values, other visitor uses, and several management objectives support the prohibition of PWC.

#### Issue 24.

Opponents to PWC use identified several park specific areas for potential PWC closure, including Grand Teton NP, Lake Mead NRA, Sleeping Bear Dunes NL, Lake Powell at Glen Canyon NRA, Lake Shasta and Whiskeytown Lake at Whiskeytown-Shasta-Trinity NRA, Padre Island NS, Cape Cod NS, and Gulf Islands NS.

#### NPS Response

The NPS recognizes that certain activities that may be appropriate in one area may not be appropriate in another area. *NPS Management Policies* 1988 states in part that... "because of differences in individual park enabling legislation and resources and differences in the missions of the NPS and other Federal agencies, an activity that is entirely appropriate when conducted in one location may be inappropriate if conducted in another" (Chapter 8:2-3). PWC use has been reported to occur in 32 units of the National Park System and may be appropriate in approximately 21 of these areas. There are a number of areas where PWC use is not appropriate and should not be allowed. It is the objective of this regulation to ensure that PWC use only

occurs where authorized after determining its appropriateness.

#### Issue 25.

We received 5,894 comments related to vessel operation and operator behavior. PWC industry representatives dispute statistical analysis of conservation organization PWC safety data. The industry offers contradictory data and dismisses the methods of tabulation.

#### NPS Response

A 1989 U.S. Coast Guard boating safety study defends industry contentions that other sporting activities are inherently more dangerous than PWC operation. The study indicates that canoes are several times more likely to have critical incidents than PWC. The PWC industry also noted a 1998 National Transportation Safety Board study that stated that alcohol impairment in PWC accidents was less frequent than in other boating related accidents. These claims were contradicted by statistical data that reflect an inordinate percentage of PWC accidents and injuries in relation to the number of overall registered vessels throughout the country. Opponents were vivid in describing episodes and encounters, including fatalities, involving PWC.

#### Issue 26.

One commenter described how after being approached by PWC while kayaking “It felt like being mugged in an urban park.” A large number of commenters described dangerous episodes involving PWC and swimmers and kayakers, including near incidents of being capsized. Other power vessel operators cited dangerous encounters with PWC operators attempting to jump their vessels’ wake, failing to yield the right of way, and erratic vessel operation. Commenters also described youthful or underage PWC operators as lacking full control of the vessel. Other powerboaters described rude and abusive encounters with PWC operators particularly when advice was offered on safety issues. One respondent stated that PWC operators “seem to have a case of maritime road rage.” This underscored their claim that these types of craft constitute a danger or at least a perception of danger when they are operated in close proximity to other users.

#### NPS Response

The rule prohibits PWC use in many areas used primarily by paddlers and visitors seeking solitude. In areas where PWCs are authorized, the NPS will take steps to minimize the adverse impacts from and between the different user groups. This should mitigate most conflicts of the type described in this comment.

#### Issue 27.

Approximately 500 individuals, 10 business and 5,600 people through petitions, expressed an opinion that PWC use adversely impacts natural resources. The commenters did not offer specific evidence of resource damage, but expressed the opinion that we should protect the natural resources until more is known about the impact PWC have on natural resources. One organization cited Executive Orders that direct the NPS to close areas to off-road vehicles (including water vessels) if the vehicles cause damage to resources. Another organization stated that resource damages are only allegations.

#### NPS Response

This rule will prohibit PWC in areas of the National Park System unless the NPS determines that PWC use is appropriate for a specific area based on that area's enabling legislation, resources and values, other visitor uses and overall management objectives. This rule describes a process that will allow continued PWC use in some areas and will enable us to better manage the use of personal watercraft. NPS Management Policies state that if we have reasonable belief that resource damage may occur, we will implement limitations on the use.

#### Issue 28.

We received 3,093 comments, mostly individuals, citing a variety of concerns over the noise associated with PWC use. All of the comments regarding noise noted the loss of quiet and solitude with the intrusion of PWC use. In almost all cases this noise was characterized as "annoying." Specific concerns included the constant and repeated fluctuation in engine tone and pitch as PWCs enter and exit the water while jumping wakes, changing speed and performing other quick maneuvers along with the persistent noise associated with remaining in one general location rather than traveling from point-to-point.

#### NPS Response

The enjoyment of solitude and natural quiet are values deemed important to most park visitors. The NPS is working on a number of measures to preserve the soundscape in park areas. The rule requires the NPS to determine that PWC use is consistent with a park unit's enabling legislation, resources and values, other visitor uses and overall management objectives before authorizing PWC use in the park unit.

#### Issue 29.

One organization and numerous individuals requested that the "two year loophole" be eliminated and that parks be either open to PWC use or closed upon publication of this rule.



## NPS Response

We feel a grace period is helpful to allow an opportunity for proper evaluation of the actual impacts of PWC use. This period will allow us time to consider management alternatives and options. Park areas with PWC use during the grace period will retain the authority to restrict use or close areas if necessary to protect against damage to natural or cultural resources and derogation of any other values or purposes of the park area. We will also conduct studies and surveys of existing PWC use during this period for use in the Special Regulation rulemaking process. The areas developing special regulations will use this time to accept and evaluate public comment on their proposed regulations.

### Issue 30.

We received 7,988 comments stating the opinion that PWC use was inappropriate in some areas of the NPS. These comments were general in nature stating that PWC, "should not be allowed", or "are inappropriate." Some comments stated that PWC disturbed the "tranquillity" or "solitude", of NPS areas. Many commenters stated that parks were sanctuaries where they went to rejuvenate themselves from the pressures of the outside world and that PWC detracted from their enjoyment. PWIA also acknowledges that PWC use may be inappropriate in some areas of the National Park System.

## NPS Response

We expect PWC use to continue in several areas of the National Park System. Because these same areas currently have the preponderance of PWC use in areas of the National Park System, we expect little, if any, economic impact on PWC users or the PWC industry on a regional or national basis. We completed a threshold analysis, as required by the Regulatory Flexibility Act, to examine potential impacts on small entities and consider alternatives to minimize such impact. We do not expect significant impacts on commercial PWC operations in and adjacent to NPS areas from this rule. A substantial number of small entities will not be affected.

Moreover, from the point of view of both users and the industry, it is quite likely that any restrictions in one area would only shift usage to other areas, either within or outside the park area. While such restrictions may reduce the quality of experience for some PWC users, we expect this rule to have a positive impact on non-PWC users.

### Issue 31.

We received an additional 401 miscellaneous comments from individuals, groups, and organizations citing a number of opinions, both for and against personal watercraft use. Opponents of PWC compared them with off-road vehicles, snowmobiles, and airboats as a form

of recreation that detracted from the experience of other visitors. Proponents of PWCs consider their use as a valid form of recreation regardless of the NPS mandates for preservation. We received one comment from an organization suggesting that we develop an Appropriate Recreation Task Force to analyze future use.

## **NPS Response**

This rule takes a conservative approach to managing PWC use based on consideration of the potential resource impacts, conflicts with other visitors' uses and enjoyment, and safety concerns.

This is the same regulatory approach we use to manage snowmobiles (36 CFR 2.18), off-road vehicle use (36 CFR 4.10), aircraft, including powerless hanggliders (36 CFR 2.17), and use of bicycles outside developed areas (36 CFR 4.30 (b)). The rule prohibits PWC use unless we determine that PWC use is appropriate based on an area's enabling legislation, resources, values, other visitor uses, and overall management objectives. Each park area is unique and represents only a small part of a much larger picture that depicts our nation's heritage. Because of this uniqueness, we do not think a national level task group would be productive.

## **Drafting Information**

The principal authors of this final rule are; Chip Davis, Washington Office of Ranger Activities, National Park Service, Michael Tiernan, Office of the Solicitor, Department of the Interior and Destry Jarvis, Office of the Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior, Washington, D.C. In addition, numerous NPS employees from areas throughout the National Park System contributed significantly to the review and development of this regulation.

## **Compliance with Other Laws**

### **Regulatory Planning and Review**

The Office of Management and Budget reviewed this rule under Executive Order 12866. This rule will not create inconsistencies with other agencies' actions. Entitlement programs or the rights and obligations of their recipients will not be materially affected. This rule does not raise novel legal policy issues. The effects of this rule may be controversial in some areas, but they are not novel. State and local governments and other Federal agencies have implemented the same measures in efforts to manage PWC use.

### **Regulatory Flexibility Act**

The Department of the Interior certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*). The Regulatory Flexibility Act, as amended, requires agencies to analyze impacts of regulatory actions on small entities (businesses, nonprofit organizations, and governments), and to consider

alternatives that minimize such impacts while achieving regulatory objectives. This threshold analysis examines impacts of the proposed regulation that would restrict PWC use within the National Park System. A combination of quantitative and qualitative indicators is used to determine whether these regulations would impose significant impacts on a substantial number of small entities. The threshold economic analysis of commercial PWC activity in relation to NPS areas supports this determination.

## Analysis of Impacts

The PWC regulation could potentially impact two types of small businesses: manufacturers and rental shops. Small nonprofit organizations and small governments will not be affected. With respect to small manufacturers, significant impacts are not likely given the relatively low level of PWC use in affected NPS units compared to the overall use of PWCs throughout the United States. Over 1.3 million PWCs are currently in use in the U.S. with annual sales of approximately 200,000. Currently, PWC use has been observed in only 32 NPS units, 10 of which will likely not be affected significantly by these regulations (Table 1). Those 10 units, which are specifically authorized in their enabling legislation for water recreation, account for the vast majority of PWC use in NPS units. Consequently, PWC use would likely be potentially affected in only 22 NPS units. Those 22 affected units generally have alternative sites nearby where PWC use is allowed. Therefore, it is not anticipated that PWC manufacturers will suffer a significant decrease in sales due to these regulations.

Most, if not all, rental shops that supply PWCs for use within NPS units could be classified as small businesses for purposes of this threshold analysis. In the 22 potentially affected units, where PWCs are currently in use some rental shops that could be potentially impacted. However, any impacts from this rulemaking should not be widespread or significant for the following reasons:

1. In 11 of the 22 affected units, a 2-year grace period would allow a locally based determination on PWC use until unit-specific rulemakings can determine appropriate management measures. Such measures would not automatically prohibit PWC use, but could limit use to areas and times that are consistent with a unit's enabling legislation, resources and values, other visitor uses, and overall management objectives. Therefore, not only would potentially affected rental shops benefit from the 2 year grace period, but a determination of appropriate levels of PWC use would be made in these units under future unit-specific regulations.
2. Future rulemakings will solicit and consider public comments on proposed management measures, potentially increasing the flexibility of such measures.
3. The remaining 11 affected units have limited commercial PWC use from

rental shops. The primary use is by individuals with privately owned PWCs. Therefore, there would be limited impacts on rental shops near those units.

4. The affected units having commercial PWC rental operations operate on larger bodies of water (oceans, lakes and rivers) of which the NPS managed portions are only a part of the larger body of water. NPS jurisdiction typically extends from the shoreline out to ¼ mile and up to one mile in various units. PWC use is managed by State and local governments in the waters outside NPS jurisdiction and is unaffected by the NPS regulation.
5. Significant opportunities for PWC use exists at alternative sites near each of the 22 affected NPS units. Therefore, potentially affected rental shops would continue to be able to rent PWCs for use at these alternative sites.
6. No direct compliance costs, such as those associated with reporting requirements, would be imposed on rental shops.

Therefore, significant impacts on PWC rental shops are not expected from this rulemaking. Moreover, even if significant impacts were expected, a substantial number of rental shops will not be affected. Currently, there are over 100 rental shops that supply PWCs for use in NPS units. However, less than 10 rental shops supply PWCs for use in units that would be automatically closed to PWC use by this rulemaking.

There are virtually tens of thousands of water areas nationwide where PWCs may be operated.

A very small percentage of the nation's 1.3 million PWCs are used in units of the NPS. In most areas where significant PWC use already occurs in the NPS, there are anticipated to be few changes that would adversely affect their current activity. Where PWC use does not already occur, the possibility of keeping those areas free of PWC use will not pose any additional economic impact.

These considerations indicate that this rulemaking will not impose significant impacts on a substantial number of small entities.

### **Small Business Regulatory Enforcement Fairness Act**

This rule is not a major rule under the Congressional review provisions of the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2)). This rule:

- a. Does not have an effect on the economy of \$100 million or more, as demonstrated in the threshold analysis (Regulatory Flexibility Act Section).

- b. Will not cause an increase in costs or prices for consumers, individual industries, Federal, State or local governments entities, or geographic regions.
- c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises (Regulatory Flexibility Act Section).

### **Unfunded Mandates Reform Act**

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1502 *et seq.*):

- a. This rule will not “significantly or uniquely” affect small governments. A Small Government Agency Plan is not required. This rule does not change the relationship between the NPS and small governments.
- b. The Department has determined and certifies pursuant the Unfunded Mandates Reform Act, that this rule will not impose a cost of \$100 million or more in any given year on local, State or tribal governments or private entities.

### **Takings**

In accordance with Executive Order 12630, the rule does not have significant takings implications. A takings implication assessment is not required. No takings of personal property will occur as a result of this rule.

### **Federalism**

The effective date of Executive Order 13132 occurred after the publication of the proposed rule. This rule does not have significant Federalism effects. A Federalism assessment is not required. The rule will manage PWC use in NPS areas and does not infringe on State authority to manage PWC use in areas of State jurisdiction. State authorities were consulted and involved in the planning of this rule and representatives of the National Association of State Boating Law Administrators also participated.

Individual park areas regularly consult with elected state officials and various state management agencies involving a myriad of resource and recreation issues. Public comment and participation is sought on a frequent and recurring basis during general management planning and at various phases involving management of park areas. A number of areas requested comments through press releases during the decision process and received considerable feedback including correspondence from state agencies. Consideration of these comments and their impact on management decisions is reflected in the changes made to the final rule.

## **Civil Justice Reform**

The Department has determined that this rule meets the applicable standards provided in Section 3(a) and 3(b)(2) of Executive Order 12988. The rule does not unduly burden the judicial system. NPS drafted this rule in “Plain-English” to provide clear standards and to ensure that the rule is easily understood. We consulted with the Department of Interior’s Office of the Solicitor during the drafting process.

## **Paperwork Reduction Act**

This rulemaking does not contain collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995.

## **National Environmental Policy Act**

The NPS has determined that this rule will maintain the quality of the human environment, health and safety because it is not expected to:

- (a) increase public use to the extent of compromising the nature and character of the area or causing physical damage to it;
- (b) introduce conflicting uses, which compromise the nature and characteristics of the area or cause physical damage to it;
- (c) conflict with adjacent ownership or land uses; or
- (d) cause a nuisance to adjacent owners or occupants.

Also after a careful review of the exceptions to categorical exclusions in 516 DM 2, Appendix 2, the NPS has concluded that none of the listed exceptions would apply in the case of these regulations.

Based on this determination, the regulation is categorically excluded from the procedural requirements of the National Environmental Policy Act (NEPA) by Departmental guidelines in 516 DM 6, Appendix 7, section 7.4 A. (10). As such, neither an Environmental Assessment nor an Environmental Impact Statement has been prepared.

## **Government-to-Government Relationship with Tribes**

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951) and 512 DM 2, we have evaluated possible effects on Federally recognized Indian tribes and have determined that there are no effects on the tribes.

### **List of Subjects**

#### **36 CFR Part 1**

National parks Penalties, Reporting and record keeping requirements, Signs and symbols.

#### **36 CFR Part 3**

Marine safety, National parks, Reporting and recordkeeping requirements.

#### **36 CFR Part 13**

Alaska, National Parks, Reporting and record keeping requirements.

In consideration of the foregoing, the NPS amends 36 CFR Chapter I as follows:

### **PART 1 -- GENERAL PROVISIONS**

1. The authority citation for part 1 continues to read as follows:  
Authority: 16 U.S.C. 1, 3, 9a, 460 1-6a(e), 469(k); D.C. Code 8-137, 40-721 (1981).
2. Section 1.4 is amended by revising the section heading and adding a new definition, in alphabetical order, in paragraph (a), to read as follows:

#### **§1.4 What terms do I need to know?**

(a) \* \* \*

*Personal watercraft* refers to a vessel, usually less than 16 feet in length, which uses an inboard, internal combustion engine powering a water jet pump as its primary source of propulsion. The vessel is intended to be operated by a person or persons sitting, standing or kneeling on the vessel, rather than within the confines of the hull. The length is measured from end to end over the deck excluding sheer, meaning a straight line measurement of the overall length from the foremost part of the vessel to the aftermost part of the vessel, measured parallel to the centerline. Bow sprits, bumpkins, rudders, outboard motor brackets, and similar fittings or attachments, are not included in the measurement. Length is stated in feet and inches.

\* \* \* \* \*

### **PART 3 - BOATING AND WATER USE ACTIVITIES**

1. The authority citation for Part 3 continues to read as follows:  
*Authority:* 16 U.S.C. 1, 1a-2(h), 3.

2. New section 3.24 is added to read as follows:

#### **3.24 Regulation of Personal Watercraft (PWC)**

- (a) Is personal watercraft use prohibited in units of the National Park System? Yes, the use of personal watercraft in units of the National Park System is prohibited, except in designated areas.
- (b) How will the National Park Service designate areas for PWC use? We will designate areas for personal watercraft through the Federal Register, using special regulations, except for the park areas identified in Table 1, where personal watercraft use may be designated using the criteria and procedures of section 1.5 and 1.7 of this chapter.

Table 1. Park Designated PWC Use	Water Type	State
Amistad National Recreation Area	Impounded Lake	TX
Bighorn Canyon National Recreation Area	Impounded Lake	MT
Chickasaw National Recreation Area	Impounded Lake	OK
Curecanti National Recreation Area	Impounded Lake	CO
Gateway National Recreation Area	Open Ocean/Bay	NY
Glen Canyon National Recreation Area	Impounded Lake	AZ/UT
Lake Mead National Recreation Area	Impounded Lake	AZ/NV
Lake Meredith National Recreation Area	Impounded Lake	TX
Lake Roosevelt National Recreation Area	Impounded Lake	WA
Whiskeytown-Shasta-Trinity National Recreation Area	Impounded Lake	CA

(c) How does the grace period apply?

- (i) For the park areas identified in Tables 1 and 2, the regulation provides a



two-year grace period April 20, 2000 to April 22, 2002 from the requirements of the regulations. During the grace period no authorizing administrative action is needed to allow PWCs to continue to operate in the park areas identified in this regulation.

Table 2. Special Regulation PWC Use	Water Type	State
Assateague Island National Seashore	Open Ocean/Bay	MD/VA
Cape Cod National Seashore	Open Ocean/Bay	MA
Cape Lookout National Seashore	Open Ocean/Bay	NC
Cumberland Island National Seashore	Open Ocean/Bay	GA
Fire Island National Seashore	Open Ocean/Bay	NY
Gulf Islands National Seashore	Open Ocean/Bay	FL/MS
Padre Island National Seashore	Open Ocean/Bay	TX
Indiana Dunes National Lakeshore	Natural Lake	IN
Pictured Rocks National Lakeshore	Natural Lake	MI
Delaware Water Gap National Recreation Area	River	PA/NJ
Big Thicket National Preserve	River	TX

### **PART 13 – NATIONAL PARK SYSTEM UNITS IN ALASKA**

1. The authority citation for part 13 continues to read as follows:

Authority: 16 U.S. C. 1, 3, 462(k), 3101 et seq.; Sec. 13.65 also issued under 16 U. S. C. 1a-2(h), 20, 1361, 1531, 3197; Pub. L. 105-277, 112 Stat. 2681, October 21, 1998; Pub. L. 106-31, 113 Stat. 57, May 21, 1999.

2. Section 13.1 is amended by redesignating paragraphs (j) through (v) to read (k) through (w) and add new paragraph (j) to read as follows:

\* \* \* \* \*

(j) The term *motorboat* refers to a motorized vessel other than a personal watercraft.

\* \* \* \* \*

Dated: December 6, 1999

Donald J. Barry (signed)

Assistant Secretary for Fish and Wildlife and Parks